

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ROSARIO MARINELLO,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
CTF SOLEDAD,

Defendant.

Case No.: CV12-02564 PSG

**ORDER TO REASSIGN CASE AND  
REPORT AND RECOMMENDATION  
THAT PLAINTIFF ROSARIO  
MARINELLO'S APPLICATION TO  
PROCEED *IN FORMA PAUPERIS* BE  
DENIED**

On May 31, 2012, Plaintiff Rosario Marinello ("Marinello") proceeding pro se filed an amended complaint and an application to proceed *in forma pauperis*. Based on the application and the file herein,

IT IS HEREBY ORDERED that this case be reassigned to a District Court Judge with the recommendation that Marinello's application to proceed *in forma pauperis* be DENIED.<sup>1</sup>

Granting or refusing permission to proceed *in forma pauperis* is a matter within the sound discretion of the trial court.<sup>2</sup> It is the court's duty to examine any *in forma pauperis* application "to determine whether the proposed proceeding has merit and if it appears that the proceeding is

<sup>1</sup> This court is ordering reassignment to a District Court Judge because, absent consent of all parties, a magistrate judge does not have the authority to make case-dispositive rulings. *See, e.g., Tripathi v. Rison*, 847 F.2d 548, 549 (9th Cir. 1988).

<sup>2</sup> *See Shobe v. People of State of California*, 362 F.2d 545, 546 (9th Cir. 1966).

without merit, the court is bound to deny a motion seeking leave proceed *in forma pauperis*.”<sup>3</sup> A federal court must dismiss an *in forma pauperis* complaint if the complaint is: (1) frivolous; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief.<sup>4</sup>

Marinello brings a claim for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and a claim for retaliation against the California Department of Corrections and Rehabilitation CTF Soledad (“DOCR”).<sup>5</sup> These claims have already been adjudicated in favor of DOCR and affirmed by the Ninth Circuit.<sup>6</sup> Although Marinello alleges that material facts were overlooked in the previous decision by the District Court as well as in the denial of appeal by the Ninth Circuit,<sup>7</sup> Marinello ultimately is attempting to raise the same claims against the same defendant, as he has done several times previously.<sup>8</sup> His claims therefore appear barred by the doctrine of res judicata and lack merit. The case shall be reassigned to a U.S. District Judge and the undersigned recommends that the application to proceed *in forma pauperis* be DENIED.

**IT IS SO ORDERED**

Dated: 6/15/2012

  
PAUL S. GREWAL  
United States Magistrate Judge

<sup>3</sup> *Smart v. Heinze*, 247 F.2d 114, 116 (9<sup>th</sup> Cir. 1965).

<sup>4</sup> *See* 28 U.S.C. § 1915(e)(2); *see also Neitzke v. Williams*, 190 U.S. 319, 324 (1989).

<sup>5</sup> *See* Docket Item No. 6 (Amended Employment Discrimination Complaint Brief and Statement of Facts)

<sup>6</sup> *See Marinello v. California Dep’t of Corrections and Rehabilitation*, 430 Fed.Appx. 583, 583 (9<sup>th</sup> Cir. 2011)

<sup>7</sup> *See* Docket Item No. 6 (Amended Employment Discrimination Complaint Brief and Statement of Facts)

<sup>8</sup> *See Marinello v. California Dep’t of Corrections and Rehabilitation*, No. 5:11-cv-05186-PSG; *Marinello v. California Dep’t of Corrections and Rehabilitation*, No. 5:11-cv-06682-RMW.